No. 86-1035

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

JOE J. MAYES, trading as JACKSON ESTATES,
Petitioner,

-vs-

JACKSON TOWNSHIP RENT LEVELING BOARD,
TOWNSHIP OF JACKSON and
JACKSON TOWNSHIP COMMITTEE,
Respondents,

and

JACKSON ESTATES MOBILE
HOME-OWNERS ASSOCIATION,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

LEVIN, SHEA & PFEFFER
255 West County Line Road
Jackson, New Jersey 08527
(201) 364-7333

Attorneys for Petitioner

On the Petition
Michael E. Levin
Margie McMahon

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363
Cranbury, N.J. 08512
Area Code 609
443-4202

QUESTION PRESENTED

Does the 7½% cap on return on investment contained within the Jackson Township Rent Control Ordinance constitute an unconstitutional taking without compensation especially when the ordinance is interpreted to limit the landlord's rate base to the "actual cash invested" updated for inflation?

PARTIES TO THE PROCEEDINGS

Petitioner is Joe Mayes, t/a Jackson Estates. Petitioner is the plaintiff and was the appellant below.

Respondents are Jackson Township Rent Leveling Board, Jackson Township Committee, the Township of Jackson and Jackson Estates Mobile Home-Owners Association. Respondents are defendants and were appellees below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES CITED:

CASES CITED CONT'D:

UNITED STATES CONSTITUTION CITED:

OTHER AUTHORITIES CITED:

APPENDIX

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JOE J. MAYES, trading as JACKSON ESTATES,
Petitioner,

vs.

JACKSON TOWNSHIP RENT LEVELING BOARD
TOWNSHIP OF JACKSON and JACKSON TOWNSHIP
COMMITTEE,
Respondents,

and

JACKSON ESTATES MOBILE HOME-OWNERS
ASSOCIATION,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

Petitioner, Joe Mayes, t/a Jackson Estates, respectfully prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court entered on July 1, 1986.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 103 N.J. 362, 511 A2d. 589 (1986) and appears as Appendix A. A companion opinion decided the same day and which was hereto disposed of in the opinion cited above, treats the same subject matter and further explains the bases for the Court's judgment and is reported at 103 N.J. 362, 511 A2d.

589 (1986) as *Hamilton Towers Inc., et al. v. Township of Weehawken, et al.* The opinion of the Appellate Court is cited as *Mayes v. Jackson Twp. Rent Leveling Board, et als.*, Superior Court of New Jersey, Appellate Division, Docket No. A-1072-83 T2 (1984), and appears as Appendix B. The Order for Judgment rendered by the Honorable James Havey in the Superior Court of New Jersey, Law Division, Ocean County under Docket No. L-25741-81 E.P.W. is dated September 27, 1983 and appears as Appendix C hereto.

JURISDICTION

The judgment of the New Jersey Supreme Court was dated and entered on July 1, 1986. Plaintiff-Appellant's motion for leave to file a Motion for Reconsideration as Within Time was granted and Plaintiff-Appellant's Motion for Reconsideration was denied. By Order of the New Jersey Supreme Court, Docket No. 23,355, M-347/348, which is dated November 21, 1986 and appears as Appendix F hereto. Jursidiction of this Court is invoked under 28 *U.S.C.* § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, U.S. Const. provides:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

As made applicable to the states by Amendment XIV of the U.S. Const., which provides in pertinent part:

> §1 No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

The question presented in this case was first argued specifically to the Supreme Court of New Jersey on appeal. While the issue of a confiscation had been raised at the lower levels, the question of a violation of the United States Constitution was first raised in a petition for certification in the New Jersey Supreme Court. These arguments were flushed out further in the Supplemental Brief for Plaintiff-Appellant. These documents are attached hereto as part of Appendix D. The New Jersey Supreme Court rejected these arguments in its opinion which is attached hereto as Appendix A wherein it ruled that the ordinances do not have a confiscatory effect.

B. Factual and Procedural History

The relevant facts of this case are that Petitioner purchased Jackson Estates Mobile Home Park (hereinafter "Park") in February, 1979 for $1,300,000.00 with $150,000.00 in cash and an escalating interest rate mortgage of $1,150,000.00 which rate, at the time of the Board hearings, stood at 12%. Between February, 1979, and December, 1980, plaintiff made further capital improvements and contributions to the Park such that his actual cash investment totaled $316,054.00. The value of plaintiff's cash investment, adjusted for inflation to the time of the hearings before the Rent Leveling Board, was $406,987.00.

Plaintiff's total historical cost regarding the Park was established at $1,428,373.00 through December 31, 1980.

This figure represents the purchase price plus capital contributions made by the owner including the mortgage principal

for which the owner is personally liable. These costs when updated for inflation to the time of hearings were $1,965,674.00

These costs were rejected by the Court below as a rate base when the Court relied on its previous decision in *United Mobile Home Park, Inc., et als. v. Township Committee of the Township of Jackson, et al.*, Superior Court of New Jersey, Appellate Division, Docket No. A-3405-82 T2 (1984), *cert. denied* 99 N.J. 96 (1984), and in that case the Court held that the rate base would be limited to actual cash invested as updated for inflation.

Various experts were called upon to testify before the defendant, Rent Leveling Board, with regard to the establishment of a rate base as well as with regard to the establishment of a fair rate of return. Mr. George Lorbeck was an expert real estate appraiser with special and extensive experience in the valuation of mobile home parks who had appeared and testified before other rent leveling boards and he appeared as an expert witness for the applicant in order to establish the rate base. Mr. Lorbeck prepared an appraisal report of the Park which was placed in evidence as Exhibit A-2 at a hearing before the board.

Mr. Lorbeck utilized the depreciated replacement cost approach because no comparable "Five Star" parks had been sold in the area to establish a basis for a comparative sale or fair market value approach. Mr. Lorbeck defined "Five Star" parks as those with the highest quality ratings for roadways, areas, clubhouse, pool, offices, and general esthetics.

The appraisal report was developed by evaluating raw acreage on a per site basis using two nationally accepted costs manuals with the same amenities and adding the per site cost for improved sites in the Park. The land was valued at $148,000.00 notwithstanding the local tax assessment of $232,000.00. To the aforementioned figure was added a per site improvement cost of $12,700.00 for each of the 165 finished sites. The replacement cost range per unit for comparable parks in New Jersey was established to be between $11,000.00 and $14,000.00 per site. Mr. Lorbeck's estimation of value of the Park based on the replacement cost approach, adjusted for

depreciation, was $2,100,000.00.

In response to questioning by defendant Board's counsel, Mr. Lorbeck testified that the purchase price paid by the owner in 1979 was artificially low and not representative of true market value because the 1979 sale was under distress conditions attributable to a bankruptcy proceeding and such conditions would normally depress an otherwise open market price.

The second expert to testify before the Board on behalf of the applicant with regard to both the establishment of a rate base and rate of return was Richard Reading. *Mr. Reading was accepted by the Board as an expert economist with special credentials in the area of economic demographic research and with substantial background in the isues bearing on rent control of mobile home parks and in establishing fair rates of return on such investments* [Emphasis added]. At the time of the hearings before the Rent Control Board, Mr. Reading represented approximately 50 financial institutions in New York and New Jersey and served as a consultant to 17 New Jersey municipalities regarding land development and fiscal analysis and was involved in various trials and assisted in the preparation of Fair Housing Allocation Analyses for approximately twelve municipalities. Notably, Mr. Reading worked with the mobile home park operators and the Rent Control Board of Egg Harbor Township to restructure their rent control ordinance to provide flexibility and reduce costs in implementing the town's rent control ordinance.

In addition to Mr. Reading's expertise in establishing fair rates of return as described above, Mr. Reading's opinions were also based on the testimony and report of Mr. Lorbeck, the application in evidence as Exhibit A-1 which included the financial statements, his familiarity with the applicant's mobile home park and the mobile home park industry in Ocean County and New Jersey as well as his study and review of the existing Jackson Township Rent Control Ordinance.

Mr. Reading defined a fair rate of return as "a return which encompasses all factors and one which varies over time... . It is a rate of return which is influenced by interest rates,

inflation and by risk... . High enough to encourage good management and adequate maintenance of services and reward an efficient operation... . High enough to discourage a flight of capital in the rental housing market and enable an operator to support his credit... . It would be a just and reasonable return, which is generally commensurate with the investment in other enterprises having corresponding risks."

Mr. Reading established that, at the time of the hearings, the rate of return on "no risk" investments such as money market certificates and insured bank certificates was 16.13%. Said "no risk" investments according to Section 86-5G of the Jackson Township Rent Leveling Ordinance entitled a mobile home park operator to receive an interest rate commensurate with the 30-month money market certificate on loans he makes to the Park. He testified that this rate of return on "insider" loans was totally inconsistent with Section 86-5A of the Jackson Township Rent Leveling Ordinance which only allowed a 7½% return on the owner's investment.

Mr. Reading discussed a wide range of investments and corresponding rates of return including the Federal Discount Rate of 13¼%, the Prime Commercial Paper Rate averaging 15.2%, the Prime Rate in banking of 16.5%, the average mortgage residential rate of 16.36%, and the long term treasury note rate of 13.39%, all of which were in effect at the time of the application. He distinguished all of those investments as being relatively safe as compared to a mobile home park investment which was a "relatively high risk investment in terms of other commercial rental property". Mr. Reading went on to define a mobile home park as a "high risk" investment because it was a "relatively particular and...specific land use" which was not amenable to other commercial use if the park failed. Mr. Reading stated that moblie home parks were not favored in the financial industry and that because of the risk factor loan rates to such park developers were traditionally 2% higher than available on other commercial property.

Mr. Reading further testified that the fair rate of return necessary to attract an investor or maintain the existing invest-

ment in the Park would be 18% to 19% and that, in relation to the dates in the application, less than 16% would be confiscatory. *Mr. Reading defined a "confiscatory rate" as one which yielded a return lower than required to economically justify the changes in constructing or purchasing and maintaining the property. Mr. Reading also testified that a 7½% ceiling on return on investment in Section 86-5 of the Ordinance was inadequate to provide the owner a fair rate of return since the ceiling was a "rate well below its actual mortgage costs and... well below what Section 86-5G authorizes on other loans made to the company."* [Emphasis added].

Mr. James Gary was an expert who appeared as a Certified Public Accountant on behalf on intervenor-defendant, Jackson Estates Mobile Home-Owners Association, and he admitted on cross-examination that when the monthly interest figure, per tenant, of $77.08 was included as an operating expense (as the Resolution of April 2, 1982 by the Board in fact did) and not as part of landlord's rate of return, the rate of return to the landlord, based on the application, would be 1.1%.

LEGAL ARGUMENT

POINT I

THE ISSUE OF WHETHER OR NOT THIS ORDINANCE, AS APPLIED CONSTITUTES AN UNCONSTITUTIONAL TAKING IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

This Court has long held that rate regulations and land use regulations by the State, in and of themselves do not constitute a "taking" which would require compensation under the Fifth and Fourteenth Amendments to the Constitution.[1] However, the Court has noted that, while a set formula for determining a talking can not be developed,[2] there are occasions when rent or land use regulation rises to the level of an unconstitutional taking. The Court has ruled that "Constitutional rights like all others, are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make the limit five feet would require compensation..." *Martin v. District of Columbia*, 205 U.S. 135, 139, 27 S.Ct. 440, 441, 51 L.Ed. 743, 744 (1906). So, to permit a township ordinance to be applied in a manner which would limit the landlord's rate of return to 1.1% constitutes an unconstitutional taking. In one of the earlier decisions involving rent control the Court noted that if the government can regulate a building's height it can

---

1 Rent control statutes were initially upheld as being part of the necessary legislation arising out of a wartime emergency. *Bowles v. Willingham*, 321 U.S. JO3 88 L.Ed. 892, 64 S.Ct. 641 (1944); *Block v. Hirsch*, 256, U.S. 135, 65 L.Ed. 865, 41 S.Ct. 458 (1921). However, the showing of an emergency is no longer required. *Eisen v. Eastman*, 421 F.2d 560 (1969), *cert. denied* 400 U.S. 841, 27 L.Ed. 2d 75, 91 S.Ct. 82 (1970).

---

2 *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 62 L.Ed. 2d 332, 343, 100 S.Ct. 383, 390 (1979).

regulate rent, but the Court must decide if the regulation goes too far. *Block v. Hirsh,* 256 U.S. 135, 156, 65 L.Ed. 865, 871, 41 S.Ct. 458, 459-460 (1921).[3] Petitioners assert that the method of determining the base rate under the Jackson Township Rent Control Ordinance, coupled with the 7½% cap on the rate of return, is the equivalent of the five foot restriction.

Petitioner understands that in trying to establish a fair rate of return at a particular point in time, there is no absolute scientific method to be applied. However, the setting of a cap upon the rate of return based solely upon an arbitrary percentage which does not respond to factors such as the reasonable expenses of operating the property, the income, and the principal on the mortgage for which the owner is personally liable, cannot pass constitutional muster. Numerous factors affecting the landlord's management and financing are completely ignored in administering this ordinance. Clearly, in this case, the failure to account for the factors renders the ordinance unconstitutionally confiscatory.[4] Furthermore, while the

---

3 In the case of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 67 L.Ed. 322, 326, 43 S.Ct. 158, 160 (1922) the Court noted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

---

4 Mr. James Gary, who appeared on behalf of the intervenor-defendant, Jackson Estates Mobile Home-Owners Association as an accounting expert stated that when the monthly interest figure, per tenant, of $77.08 was included as an operating expense and not as part of the landlord's rate of return the rate of return to the landlord based on the application, would be 1.1%.

Petitioner is aware that the Massachusetts Supreme Court has found that a rent control ordinance which does not allow a landlord to cover his mortgage interest payments is not necessarily confiscatory since the Rent Control Board (which used the fair market value of the property as a rate base) could have found that the landlord's purchase price was more than the fair market value. *Zussman v. Rent Control Board,* 371 Mass. 632, 359 N.E. 2d 29 (1976). This decision, however, is not applicable in this case because the petitioner's purchase price and costs adjusted for inflation came to $1,965,674.00 while the value of the park using the replacement cost approach came to $2,100,000.00. These figures reflect the situation at the time of the hearings before the Board.

ordinance claims to grant a 7½% rate of return the true effect is to allow a much lower rate.[5] However, in other rate cases Courts have refused to ignore gross inequalities for the sake of easy conclusions. *Stewart Dry Goods v. Lewis*, 294 U.S. 550, 560, 79 L.Ed. 1054, 1059, 55 S.Ct. 525, 529 (1935).

Rent Control regulations unarguably affect real property interests, and should be treated in the same fashion as other land use regulations. Therefore, even though many cases relevant to this question are not specifically rent control cases, the similarity between rent control and other land use regulations should require that they be judged by the same constitutional standards. Rent Control regulations are designed to protect the interests of both tenants and landlords. When an ordinance is applied in the manner in which the Jackson Township Rent Control Ordinance has been applied to the Petitioner, the regulation favors the tenants to such a degree as to cause an unconstitutional taking.

---

5 "The Court measures a taking of property not by what a state may say, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298, 19 L.Ed. 2d 530, 536, 88 S.Ct. 438, 443 (1967) (Stewart, J. concurring).

CONCLUSION

For all the foregoing reasons, Petitioner respectfully prays the Court grant a Writ of Certiorari to review the opinion and judgment of the New Jersey Supreme Court.

Respectfully submitted,

By: s/M.E.L.
MICHEAL E. LEVIN, ESQUIRE

By: s/M.M.
MARGIE McMAHON, ESQUIRE

THOMAS COMER, LAW CLERK
LEVIN, SHEA & PFEFFER
255 West County Line Road
Jackson, New Jersey 08527
(201) 364-7333

Attorneys for Petitioner

APPENDIX

APPENDIX A

SUPREME COURT OF NEW JERSEY, 1986.

Mayes v. Jackson Tp. Rent Leveling Bd. 103 N.J.
Cite as, 103 N.J. 362

JOE J. MAYES, TRADING AS JACKSON ESTATES, PLAINTIFF-APPELLANT, v. JACKSON TOWNSHIP RENT LEVELING BOARD, TOWNSHIP OF JACKSON AND JACKSON TOWNSHIP COMMITTEE,
DEFENDANTS-RESPONDENTS,

AND

JACKSON ESTATES MOBILE HOME-OWNERS ASSOCIATION,
INTERVENOR-RESPONDENT.

HAMILTON TOWERS, INC., A NEW JERSEY CORPORATION AND FULTON HOUSE ASSOCIATES, A LIMITED PARTNERSHIP OF THE STATE OF NEW JERSEY, PLAINTIFFS-APPELLANTS, v. TOWNSHIP OF WEEHAWKEN, A BODY POLITIC, AND THE RENT LEVELING BOARD OF THE TOWNSHIP OF WEEHAWKEN, DEFENDANTS-RESPONDENTS.

Argued March 4, 1986—Decided July 1, 1986

SYNOPSIS

In two cases, the Superior Court, Law Division, uphled rent control ordinances, and the Appellate Division affirmed. After granting certification, the Supreme Court, O'Hern, J., held that: (1) ordinance which allowed seven and one-half percent limit on investment return was not confiscatory after its amendment to adjust investment base to reflect landlord's actual cash investment updated for inflation, and (2) evidence did not establish that ordinance which allowed return on investment of up to six percent above available passbook interest rate was confiscatory

with regard to 57-unit apartment building.

Affirmed.

---

1. Landlord and Tenant 200.23

A rent control ordinance must permit an efficient landlord to realize a just and reasonable return on the property.

2. Landlord and Tenant 200.23

Rent control ordinance which limited landlord to a seven and one-half percent limit on his return on investment was not confiscatory after investment base was adjusted to reflect landlord's the actual cash investment updated for inflation, notwithstanding that market rates for certificates of deposit and passbook savings account were as much as 16%, considering that real estate investors would not necessarily expect the same return as those in fixed-face amount investments such as certificates of deposit or treasury bills, and that real estate investors had other commerical benefits, including tax shelter and an appreciating asset.

3. Constitutional Law 228.3

An investment-based formula in a rental control ordinance bears a debatable relationship to a legitimate public purpose, and will survive an equal protection challenge. U.S.C.A. Const. Amend. 14.

4. Landlord and Tenant 200.66

Evidence did not establish that rental control ordinance defining a fair return on investment as up to six percent above available passbook interest rate was confiscatory with regard to 57-unit apartment building, notwithstanding decline in net operating ratio.

5. Landlord and Tenant 200.56

If it is shown that an ordinance is defeating purpose of rent control by steadily diminishing income and causing flight of rental housing from the market, relief would be warranted.

Michael E. Levin argued the cause for appellant Joe J. Mayes, etc. (*Levin, Shea & Pfeffer*, attorneys; *Michael E. Levin*, and *Margaret McMahon*, on the briefs).

James J. Byrnes argued the cause for appellants Hamilton Towers, Inc., etc, et al. (*Byrnes & Guidera*, attorneys).

Joseph F. Martone argued the cause for respondents Jackson Township Rent Leveling Board, et al. (*Stanzione, Stanzione, Martone & Rosen*, attorneys).

Connie M. Pascale argued the cause for intervenor-respondent.

Richard P. Venino argued the cause for respondents Township of Weehawken, etc., et al. (*Venino and Venino*, attorneys).

Christopher J. Hanlon submitted a brief in *Mayes v. Jackson Township Rent Leveling Board* on behalf of *amicus curiae* Manufactured Housing Assoc., Inc. in New Jersey (*Gross & Hanlon*, attorneys).

The opinion of the Court was delivered by

O'HERN, J.

These cases present challenges to certain rent control provisions found in two municipal ordinances. Both ordinances use an investment-based formula to determine adjustments of allowable rents to assure a fair return to the owners. In both cases the Law Division upheld the ordinances and the Appellate Division affirmed substantially for the reasons stated by the trial court. We granted certification in these two cases, 102 N.J. 318 (1985), because of an apparent conflict in the decisions below as to whether as investment-based formula for determining fair return requires an adjustment of the investment figure for inflation. The cases were argued together and this opinion disposes of both.

Because the provisions of the two ordinances are otherwise so dissimilar in context and effect, we find no inherent conflict in the decisions. Because neither record below demonstrates that either ordinance[1] as applied fails to provide a fair return to the owner, we affirm the two judgments.

[1] We refer to the ordinances as they existed at the time of application.

I

The Weehawken case involves a challenge to rent allowances for the years 1979 and 1980. The property involved is a 57-unit, eight-story apartment building constructed in 1964. The average monthly rentals for the relevant years were approximately $289 to $300 per apartment. The building is uniquely located with a skyline view of Manhattan.

Plaintiff Hamilton Towers, Inc. is the owner of the apartment building, which is operated by plaintiff Fulton House Associates. For purposes of analysis, the plaintiffs' expenses were combined to constitute the landlord's expenses.

Weehawken adopted a rent control ordinance effective January 1, 1974. At the time of plaintiff's application, the ordinance allowed (1) an automatic inflationary increase of four percent a year in base rent, (2) tax surcharges to tenants for increases in municipal property taxes, and (3) a hardship increase if the landlord cannot (a) meet operating expenses or (b) make a fair return on investment. The Weehawken ordinance defines a fair return on investment as up to six percent above available passbook interest rates applied essentially to the owner's cash investment in the property.[2]

The Jackson Township case involves an application for rental increases for a 165-space mobile home park. The average monthly rentals allowed for the park for 1982 were $143.61 on 150 spaces and $148.83 on nine spaces in the park.

Jackson Township adopted an ordinance applicable to mobile-home rentals in 1973. The ordinance permits (1) automatic

---

2 The ordinance provides that "fair return" means "the percentage of return on equity in a real property investment." Equity is determined by the "actual purchase price minus any and all existing liens on the property." Further, the amount of return is "measured by the net income before depreciation." A fair return on the equity investment in real property is "considered to be up to six percent above the maximum passbook demand deposit savings account interest rate available in the Township." Of the six percent, three percent reflects the higher risk, and the other three percent reflects the lesser liquidity of a real estate investment as opposed to other investments.

inflationary adjustments based upon a portion of the percentage increase in the Consumer Price Index,[3] (2) automatic tax surcharges based on increases in municipal property taxes, and (3) hardship increases whenever rental and other income from operation of the park is insufficient to provide for interest payments on mortgages, reasonable and necessary expenses incurred in connection with the operation of the mobile home park, and "a return on the owner's actual balance of such investment in the mobile home park in an amount not to exceed seven and one-half percent."[4] The Jackson Township ordinance does not define "actual balance of such investment"; it was interpreted by the Rent Leveling Board "to mean the owner's actual cash investment in the park after deducting that portion of the owner's investment which has been financed through mortgages."

Both ordinances contain provisions for additional rental charges for one-time capital improvements, as well as procedures for requesting hardship increases.

We shall state the principles generally as to judicial control of rent control decisions, apply them to the two records before us, and, finally, offer certain suggestions with respect to any recurring litigation in this field.

---

3 The percentage increase in the Jackson Code is applied to the tenant's existing base rent as follows:

(1) 60% of the percentage increase in the Consumer Price Index (CPI) on the first $100 of base rent;

(2) 40% of the percentage increase in the CPI on the next $50 of base rent;

(3) 25% of the percentage increase in the CPI on the next $50 of base rent;

(4) 10% of the percentage increase in the CPI on that portion of the base rent that exceeds $200.

---

4 In companion litigation, the trial court held that under the Jackson rent control ordinance an applicant need not initially elect between the CPI and hardship relief routes.

II

[1] Stating the general principle applicable to these cases is easy. "[A] rent control ordinance must permit an efficient landlord to realize a 'just and reasonable return' on [the] property." *Helmsley v. Borough of Fort Lee, 78 N.J. 200, 210 (1978), appeal dismissed, 440 U.S. 978, 99 S. Ct. 1782, 60 L. Ed. 2d 237 (1979)* (quoting *Hutton Park Gardens v. Town Council of West Orange, 68 N.J. 543, 568 (1975)).* Deciding what is a "just and reasonable return" in a given case can be very difficult.

The varied methods that may be used to determine fair return are described by Kenneth Baar in *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723 (1983):*

> The most commonly used fair return standards are return on value, return on equity, return on gross rent, percentage net operating income, cash flow, and maintenance of net operating income. There are substantial differences in the manner in which each of these formulas operates and in the classes of landlords and tenants which they benefit. [Id. at 784.]

In this case, both ordinances purported to use the return-on-equity standard. Under the formula as used in these ordinances, allowable rent appears to cover at least operating expenses, mortgage interest payments, and a percentage of cash investment. The Weehawken and Jackson ordinances use investment-based approaches to determining fair return on equity. The use of such a formula was presaged in *Helmsley, supra.* In that case the Court noted:

> In view of the lack of evidence concerning plaintiffs' investment, we offer no comments on investment-based criteria for determining confiscation. Our silence does not, however, denote disapproval. Other jurisdictions have employed such criteria. *See, e.g., Marshal House, Inc. v. Rent Control Bd. of Brookline,* 358 *Mass.* 686, 266 *N.E.* 2d 876, 888 (1971). Although an investment-based standard may not be as easy to apply as some income-

based criteria, there are no obvious theoretical obstacles to using an investment-based standard. [78 *N.J.* at 216 n. 8.]

Facial challenges to investment-based formulas assert a discrepancy in that similarly-situated operators would be authorized to receive different rents under the same rent control scheme depending upon when and how much owners originally invested in the property. This point was raised in *Cotati Alliance for Better Hous. v. City of Cotati, 148 Cal.App.3d 280, 195 Cal.Rptr. 825 (Ct.App.1983).* In *Cotati*, a California intermediate court rejected a facial challenge to an ordinance that used an investment-based standard, holding that

> a local rent control ordinance which requires that landlords receive a fair and reasonable return on their investment is constitutionally valid on its face as a form of economic regulation reasonably related to the furtherance of a legitimate governmental purpose. Further[more], * * * provisions of the ordinance fixing the maximum rent which can be charged are reasonably calculated to eliminate excessive rents and, at the same time, provide landlords with a just and reasonable return on their property * * * [*Id.* at 283, 195 *Cal.Rptr.* at 827].

In *Cotati*, the court rejected a constitutional challenge to the ordinance because it was a valid form of economic regulation reasonably related to a legitimate public purpose; moreover, the court stated that "[t]he investment-based standard, unlike a value-based standard, ensures that inflationary factors will not be built into a rent control ordinance's rent ceiling adjustment mechanism, and thereby ensures the integrity of the entire rent control scheme." *Id.* at 292, 195 *Cal.Rptr.* at 833. The appellate court rejected the landlord's contention, which had been accepted by the trial court, "that a 'return on value' standard is mandated in order for a rent control ordinance to pass constitutional muster." *Id.* at 287, 195 *Cal.Rptr.* at 829. It cited favorably this Court's decision in *Helmsley v. Borough of Fort Lee, supra,* particularly the notion that " '[o]nce income is controlled, * * * using capitalization of income to

determine value to regulate future income is a circular process.' " *Cotati*, 148 *Ca.App.*3d at 287, 195 *Cal.Rptr.* at 830 (quoting *Helmsley, supra*, 78 *N.J.* at 214). It noted that "[r]eturn on investment has been characterized as the 'governing standard' in Massachusetts * * * 148 *Cal.App.*3d at 288, 195 *Cal.Rptr.* at 830 (citing *Zussman v. Rent Control Bd. of Brookline*, 371 *Mass.* 632, 638, 359 *N.E.* 2d 29, 32 (1976)).

The court in *Cotati* was able to sustain the ordinance because the undefined return-on-investment standard afforded the board sufficient flexibility to avoid confiscatory results because return on investment was not limited to initial or cash investment and the original investment could be equated with current dollar values so as to assure a fair return. 148 *Cal.App.*3d at 289, 195 *Cal.Rptr.* at 831. The court rejected an equal protection challenge simply because, though the ordinance treated one class of persons differently from another, there was "a rational relationship to a legitimate public purpose." *Id.* at 292, 195 *Cal.Rptr.* at 833. It noted that rent control has historically been imposed for emergency purposes. *Id.* Finally, the court set forth a series of pertinent factors to be considered by a rent leveling board.[5] *Id.* at 294-95, 195 *Cal.Rptr.* at 835.

The California Supreme Court recently sustained these principles, holding that the City of Berkeley's fair-return-on-investment standard would not preclude the board from avoiding confiscatory results. *Fisher v. City of Berkeley*, 37 *Cal.*3d 644,

---

5 The additional factors suggested by the court included the following:

1. Societal importance of ensuring that real estate remains a viable investment so that the rental housing stock is maintained, improved and replenished.
2. The return appropriate to this type of investment to attract and retain investors.* * *
3. Tax benefits to the landlord, including consideration of comparable tax benefits in other types of investments.* * *
4. The physical location of the property and the types of tenants.* * *
5. Particular hardship circumstances of the owner.
6. The effects of the decrease in the purchasing power of the dollar during inflationary periods.* * *

Cotati Alliance for Better Hous. v. City of Cotati, 148 *Ca.App.*3d 280, 295, 195 *Cal.Rptr.* 825, 835 (Ct.App.1983).

682. 693*P.*2d 261, 291, 209 *Cal.Rptr.* 682, 712 (1984) (en banc), *aff'd on other grounds*, 475 *U.S.* , 106 *S.Ct.* 1045, 89 *L.Ed.* 2d 206 (1986). It reiterated "that selection of an administrative standard by which to set rent ceilings is a task for local governments—in this case the voters themselves—and not the courts." 37 *Cal.*3d at 681, 693 *P.*2d at 291, 209 *Cal.Rptr.* at 712. The court's only concern was whether the "defendants" fair return on investment standard, on its face, will not permit those who administer it to avoid confiscatory results." *Id.* (footnote omitted). Again, in rejecting a facial challenge, that court noted that no formula may indefinitely freeze the dollar amount of a landlord's profits "without eventually causing confiscatory results." *Id.* at 683, 693 *P.*2d at 292, 209 *Cal.Rptr.* at 713 (citing *Cotati, supra*, 148 *Cal.App.*3d at 293, 195 *Cal.Rptr.* at 833). On appeal, the United States Supreme Court held that the Berkeley ordinance was not unconstitutional as being preempted by the Sherman Act; the Court did not, however, consider any fair return issues. 475 *U.S.* at , 106 *S.Ct.* at 1048, 89 *L.Ed.*2d at 211.

It will be seen at once that neither California decision advances the underlying question of what indeed is a fair return.

This Court has stated that it is inappropriate for a community to adopt a rent control ordinance without definitive standards. *See, e.g., Troy Hills Village v. Township Council of Parsippany-Troy Hills*, 68 *N.J.* 604, 620-21 (1975) (rent control ordinances should set forth standards and criteria by which the parties, the local rent control agency, and reviewing tribunals can be guided in determining adequacy of returns actually received under the ordinance). Hence, we believe that the attempts of these two municipalities are preferable to the kind of open-ended approach found in the *Cotati* case. Nonetheless, neither ordinance answers the ultimate constitutional question of what is a fair return. That question remains for a judicial determination of whether, as applied, the ordinance affords the investor the constitutional minimum. It is to this that we must address ourselves.

III

A.

[2] The central challenge to the Jackson rent control ordinance is that its flat seven and one-half percent limit on return fails to respond to true market conditions and is therefore inherently confiscatory. However, as a result of companion litigation in which plaintiff participated as an intervenor, the same trial court effectively amended the Jackson Township ordinance to adjust the investment base of the operator to reflect the owner's actual cash investment updated for inflation. (The opinion in the companion case, *United Mobile Homes, Inc. v. Township Comm. of Jackson,* was included as an exhibit in the proceedings.) Hence, the fundamental reasoning of the plaintiff no longer applies to the Jackson Township case since no truly fixed return is found in the ordinance but rather a rate applied to a base that floats with inflation.

In addition, although we do not have before us the full record made in the *United Mobile Homes* case that enabled the trial court to conclude that, as amended, the ordinance would not be confiscatory, we believe that enough appears to sustain that court's reasoning. In that case the court further modified the ordinance to permit the use of updated expense information. On the record before us, the plaintiff undertook to demonstrate by replacement-cost analysis or income-based analysis that comparable mobile home trailer parks operating in an unregulated economy would warrant monthly rent of $211. Plaintiff pointed to the illogic of an ordinance that limited him to a seven-percent return on cash investment when current market rates for certificates of deposit and passbook savings accounts were as much as sixten percent. The trial judge noted that in *United Mobile Homes* it upheld the seven and one-half percent increase "notwithstanding the testimony of experts that in other types of investments rates of return in the 16 to 20 percent level could be realized without the type of risk associated with mobile homes." Plaintiff further pointed to a seemingly inconsistent provision of the ordinance that would have permitted an investor to loan money to the corporation instead of investing it and receiving the higher rates of current passbook accounts:

the trial court interpreted this as merely a limit or cap on the interest rate that could be charged by a stockholder to his corporation and not a modification of the "clearly established 7½ percent rate." In sum, in this case the trial court applied a rationale that it had employed in the companion litigation. It found the Jackson ordinance to be confiscatory to the extent that it did not adjust the owner's investment for inflation. Recall that in *Cotati* it was precisely this ability to adjust that original investment for inflation that enabled the ordinance to survive the facial challenge. *Cotati Alliance for Better Hous. v. City of Cotati, supra,* 148 *Cal.App.*3d at 288-90, 195 *Cal.Rptr.* at 831-32.

Turning then to the question of whether a seven and one-half percent return on adjustment investment is confiscatory, the trial court in *United Mobile Homes* concluded that real estate investors would not necessarily expect the same return as those in fixed-face amount investments such as certificates of deposit or treasury bills. It noted that the real estate investor has other commercial benefits, including, in some situations, tax shelter and an appreciating asset. We note in passing that some current government mortgage financing regualtions contemplate an eight-percent return on equity. *See, e.g., N.J.S.A.* 55:16-5 (Limited-Dividend Nonprofit Housing Corporations or Associations Law limits repayment of investment to a sum equal to the shareholder's "investment plus cumulative dividends at a rate not to exceed 8% per annum"). In rental-apartment-assessment cases for contemporary taxable years, some capitalization rates for equity were set at eight percent, *River Drive Village v. City of Garfield,* 7 *N.J. Tax* 632, 642 (Tax Ct.1985), and nine and one-quarter percent, *Petrizzo v. Borough of Edgewater,* 2 *N.J.* Tax 197, 204 (Tax Ct.1981). The trial court noted that even if plaintiff Joe Mayes' investment base were adjusted for inflation, it would not require an increase above that allowed by the automatic inflationary process. We are unable to say that the trial court clearly erred in concluding the rate-of-return permitted under the ordinance was not confiscatory after the changes the court made. While reviewing courts remain free to rule on ultimate constitutional determinations, considerable deference remains to be paid to a trial

court finding. *Zussman v. Rent Control Bd. of Brookline, supra,* 371 *Mass.* at 368, 359 *N.E.* 2d at 32.

B.

[3] In the Weehawken case, the challenge was not to the static rate of return on the investment, since Weehawken's rate floated up to six percent over current passbook demand deposit rates. A constitutional challenge was mounted at the trial level. Plaintiffs argued that there was an inherent illogic in an ordinance that allowed widely variant rents depending upon the amount of capital invested in the premises.[6] In an earlier decision incorporated by reference in *Weehawken,* the trial court ruled that despite its logic, this argument should be addressed to the governing bodies of the municipalities; absent a showing of unconstitutional confiscation, it does not present a court with an opportunity to rewrite the ordinance. We agree that an investment-based formula "bears a debatable rational relationship to a legitimate public purpose" that will survive an equal protection challenge. *Fisher v. City of Berkeley, supra,* 37 *Cal.*3d at 684, 693 *P.*2d at 293, 209 *Cal.Rptr.* at 714.

[4] The plaintiffs' fair-return challenge was based upon a value-based theory of confiscation. Plaintiffs' expert witness posited a hypothetical investor for the premises and determined what he considered to be the typical market financing of seventy-percent capital and thirty-percent equity. The expert applied an anticipated profit rate to the thirty-percent equity and a predetermined constant to the seventy-percent mortgage to arrive at a weighed capitalization rate of .1207. Dividing this rate into net operating income in order to determine value resulted in the property's showing a considerable decline in value in 1979 and 1980: using this formula, for 1971 the value was $772,800, whereas for the period from July 1, 1979, to June 30, 1980, the value was $518,000.

The municipality's response to this was unexpected, to say

---

6 The Weehawken ordinance does not appear to include mortgage interest as an expense before calculating return on investment. The board ruled in this case that even if the mortgage interest were included, the return on equity would have been higher than the approximately eleven percent under the ordinance.

the least. Its expert conceded the general validity of the plaintiffs' market data approach but suggested that the expense figures were disproportionate and asserted that the owner should have sought a reduction in taxes that would have had the effect of reducing expenses. In a candid colloquy with the trial court, the municipality's expert conceded the effect of the ordinance on the rental value of the property:

THE COURT: All right. Well, pardon me, that's what makes it such a lousy investment, that's what you're really saying. I mean, in theory, at least, if we left rent control over here somewhere wouldn't this housing inflate along with everything else, all things being equal, supply and demand, that's what we're trying to stop is the law of supply and demand?

THE WITNESS: Yes.

THE COURT: You're trying to cut that off. But, * * * you agree that this concept, this language in this ordinance and the way in which you arrive at return for your investment does not advance the legislative goal, but rather defeats it, because, as you've said, the value of this building is converting it to a condominium and taking it off the rental market. * * * [I]sn't that what you said before?

THE WITNESS: That would be the maximum value that could be ascertained for this particular building at the period of time that we are talking about.

THE COURT: Well, otherwise you would lose money on it?

THE WITNESS: Except, Your Honor, with —

THE COURT: Pardon me, just a minute, so maybe I don't understand you, and I want to be sure that I do. You say the one way to value it is a rental unit?

THE WITNESS: Yes.

THE COURT: Now, you agree that it has depreciated substantially as a rental unit, so therefore if you sold as a rental unit you would lose money on your investment. Did you say that, did I misunderstand you?

THE WITNESS: Yes, if that's exactly what you did, you

would lose money, but no one would do that.

THE COURT: Well, pardon me, just a minute, the reason no one would do it is no one likes to lose money.

THE WITNESS: Correct.

THE COURT: All right. So, we would then encourage, because * * * continuing it as a rental unit is a losing proposition, to take it off the rental market and put it into something more profitable like a condominium?

THE WITNESS: Correct.

The trial court, however, felt itself bound by this Court's decision in *Helmsley* to conclude that it could not determine confiscation on a value-based standard because of the asserted circularity of the argument, the point being that of course rent control depreciates values. Accordingly, it declined to set aside the findings of the local rent control board on that basis.

No specific challenge or suggestion was made with respect to updating the original investment for inflation or taking into account the other factors suggested in *Cotati*.[7] Again, we are left with a record that does not establish the confiscatory effect here. Plaintiffs point to a decline in the net operating ratio of the building, showing that in 1977 the net operating expenses

---

7 Adjusting the property owner's original investment to account for inflation from 1964 to 1980 (using the expert's inflationary figure of .375), the required return would have closely matched the actual return:

	Expressed in 1964 Dollars	Expressed in 1980 Dollars
Costs and Improvements	$764,591.50	
Less Mortgages	600,000.00	
Investment Base	164,591.50	$438,910.66
Fair Return Rate	11.25%	11.25%
Fair Return Amount	$ 18,516.54	$ 49,377.45
Actual Net Operating Income		$ 45,935.00

We note that although increasing an investment base to adjust for inflation is not a constitutional imperative, it would be an almost complete answer to a claim of confiscation if the return on the original investment was reasonable in itself.

totalled 44.3 percent of gross while in 1980 they totalled 71.1 percent. The trial judge declined to set aside the resolution on the basis of a declining net operating ratio. He indicated that "plaintiff had an extremely profitable enterprise"; moreover, "if an income based standard were used in the Weehawken ordinance, plaintiff would be entitled to a modest hardship increase, but certainly not such an increase as to return it to its level of 1971 profitability." In addition, there was apparent confusion concerning an inflated oil expense item caused by leaks in the system. There was also evidence that heat was poorly distributed throughout the building and that plaintiff was an inefficient manager. The trial court was of the view that though "there might be a landlord who is so situated as to suffer confiscation under the return on equity criteria * * * plaintiff at bar is not that landlord."

Since the date of its decision, we have been informed that the trial court's prophecy was self-fulfilling in that the property was in fact sold for a figure substantially above the income value with the purpose represented as condominium conversion. In short, given the heavy burden of proof that the plaintiffs have in these cases and the information furnished to us at oral argument that the premises have been sold with the apparent purpose to convert them to condominium uses, we cannot conclude that the trial court erred in its finding of no confiscation.[8]

IV

Each of these cases demonstrates, however, the difficulty that local agencies and reviewing courts have experienced in the administration of rent control ordinances. For example, in the Jackson Township case the consitutional challenge was attempted before the rent leveling board. That board, however, was operating pursuant to an ordinance that purported to decide what was a fair return. It is difficult to conceive how a board, under

---

[8] We also note that, pursuant to an interlocutory order issued in December 1980, the Law Division permitted a 12% rental increase pending litigation; the increase was to be held in an interest-bearing escrow account. Presumably the landlord would be entitled to the CPI or tax increases for the years in which rents were escrowed. The parties did not address this issue and we do not resolve it.

those circumstances, could effectively address a constitutional challenge. It would be arbitrary to depart from the provisions of its own ordinance. Conversely, in the Weehawken case, the constitutional challenge was raised directly in the Superior Court with the plenary trial of those issues being heard by the trial judge. Each of these approaches to determining constitutional return has its disadvantages. A local rent leveling board should have the fullest opportunity to consider all of the evidence bearing on what is a just and reasonable return.[9] In *Helmsley*, the Court recognized "that many municipalities will continue to rely upon unpaid volunteer Rent Leveling Boards" that may " 'not have sufficient expertise to understand the complexities of rent regulation and real estate finance.' " *Helmsley v. Borough of Fort Lee, supra*, 78 *N.J.* at 233-34 (quoting Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenant's Movement*, 28 *Hastings L.J.* 631 (1977)). It will probably remain necessary to permit constitutional challenges to be mounted in the courts although obviously the best record should be made before the rent control agency, which may resolve many of these issues.

There is a paradox here, as noted, in that we have insisted that municipal bodies act in accordance with standards that are not vague. At the same time, we have insisted that the only true test of the validity of an ordinance will be in its application in particular cases. *Troy Hills Village v. Township Council of Parsippany-Troy Hills, supra*, 68 *N.J.* at 621. The ultimate question will always remain whether the ordinance, as applied, has a confiscatory effect upon the property.

Although the financial conditions that promoted the rapid growth of rent control in New Jersey are no longer present, such as the double-digit inflation and oil crises of the 1970s, it appears likely that despite a leveling of inflation and the noninflationary trend of the present economy, rent control will

---

9 Under Massachusetts procedures, the fair return decision is made by either a local board or a "rent control administrator." The fair return record made before the board or administrator serves as the basis for constitutional review by the appellate courts. *Zussman v. Rent Control Bd. of Brookline*, 371 *Mass.* 632, 638, 359 *N.E.*2d 29, 32 (1976); *Niles v. Boston Rent Control Adm'r* 6 *Mass.App.Ct.* 135, 137-144, 374 *N.E.2d* 296, 299-301 (1978).

remain a fixture in many New Jersey communities. Rent control is no longer predicated upon a housing emergency. *See Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 594 (1975). It may be regarded as a form of governmental regualtion in the public interest. *Helmsley v. Borough of Fort Lee, supra*, 78 *N.J.* at 243. Significant changes have been made in the economic relationship between landlord and tenant. *See, e.g., N.J.S.A.* 2A:18-61.1 to -61.21 (Anti-Eviction Act); *N.J.S.A.* 2A:18-61.22 to -61.39 (Senior Citizens and Disabled Protected Tenancy Act); *N.J.S.A.* 2A:18-61.1(f) (unconscionability of rent increase is a defense to removal for cause based upon failure to pay rent); *see also* New Jersey Institute for Continuing Legal Education, *Tenant-Landlord Practice* 53 (1983) ("Virtually all rent control ordinances provide that tenants may apply for reduced rents for failure to provide the same standards of service and maintenance which the landlord provided or was required to provide by law or lease").

Nonetheless, new patterns of development in New Jersey have unleashed powerful market forces that have continued to create instability in the rental housing market. Particularly in the fast-growing areas along the Hudson River, so much advantage exists in the new commercial or condominium markets that owners are forcing out existing tenants. Winerip, *For Jersey Tenants, Hard Lessons in Real Estate*, N.Y. Times, April 1, 1986, at B2, col. 1. These speculative forces threaten the ability of a community to maintain a sound housing balance for its citizens.

It appears likely then that judicial challenges to rent control decisions will continue. The trial court in the Weehawken case remarked that "[w]ith no formula or set of absolutes for trial courts to apply, we are left only with a vague sense of what the outer limits of unfairness are for purposes of constitutional tests." Future litigation might focus more concretely upon additional evidence that will better enable reviewing courts to determine whether a fair return has been achieved.

An aid to a reviewing court would be a record of whether the property's net operating income has been steadily diminishing. This measure is reflected in many rent control or-

dinances and is in part the theme of *Helmsley v. Borough of Fort Lee, supra.* In *Helmsley,* the Court considered the effect of the Fort Lee ordinance against a background of increasing operating expenses and predicted in the operation of the ordinance a continuing diminution in net operating income. 78 *N.J.* at 220-22. In considering the effect of limiting rent increases to 2.5 percent the Court found that "five years of 6% operating expense increases and 2.5% rent increases would produce a 5.4% decrease in [net operating income]. After deducting debt service, however, the landlord's cash flow would decrease approximately 20%." *Id.* at 221. In *Helmsley,* the Court projected the dimishing income on the basis of the anticipated effect of the ordinance over a period of years and found the ordinance facially invalid when the projected effect was combined with an inadequate hardship-relief mechanism. *Id.* at 233.

Kenneth Baar and Dennis Keating recommend a maintenance-of-net-operating-income (cost-passthrough) fair return standard. Baar & Keating, *Controlling Rent Control,* 11 N.J. *Reporter* 19, 24 (Oct.1981).

> This type of standard has been used since the early 1970's in Massachusetts, where it has led to generally satisfactory results and has withstood legal challenges. Under this standard, a landlord is entitled to a hardship increase if operating expense increases after a designated date have exceeded increases in rental income. In effect, the standard preserves a landlord's net operating income, rather than designating a particular rate of return on equity or value as fair for all landlords. [*Id.*]

Stated in a formula, it is that

> gross rent = base period rent + (current operating expenses-base period operating expenses).

Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, supra,* 35 *Rutgers L.Rev.* at 809. The measure should be kept simple. For purposes of using this analysis, a court need not now require that the operating income be adjusted for inflation. *See, e.g., id.* at 843 (annual general adjustment stan-

dards "that tie annual increases to overall inflation rates may allow for increases which are more or less than adequate to cover operating cost increases"). The analysis was suggested in *Helmsley*, where the Court noted that "long-term stagnation of profits might [itself] be proved to be confiscatory[,]" although the issue was not before it. 78 *N.J.* at 218, 223. It would be a rough measure of the ordinance's effectiveness. We do not perceive in New Jersey's rent control schemes a plan to diminish property value; nor do any of the commentators. *See, e.g.*, Note, *Rethinking Rent Control: An Analysis of "Fair Return,"* 12 *Rutgers L.J.* 617, 625-26 n.76 (1981) ("policy underlying New Jersey's moderate rent control may be indentified as that of stabilizing rents while avoiding the harsh consequences of strict rent control, such as * * * decline in property value").[10]

In *Fisher v. City of Berkeley, supra*, the California Supreme Court noted that a rent control ordinance cannot indefinitely freeze rent ceilings. 37 *Cal.*3d at 683, 693 *P.*2d at 292, 209

---

10 Although "confiscatory" has been defined in terms of "the lowest constitutionally permissible rate," *Troy Hills Village v. Township Council of Parsippany-Troy Hills*, 68 *N.J.* 604, 622 (1975), it has also been defined as the "antonym" of "just and reasonable." *Hutton Park Gardens v. Town Council of West Orange*, 68 N.J. 543, 569 (1975). The rate of return

> must be high enough to encourage good management including adequate maintenance of services, to furnish a reward for efficiency, to discourage the flight of capital from the rental housing market, and to enable operators to maintain and support their credit. * * * On the other hand [a just and reasonable return] is also one which is not so high as to defeat the purposes of rent control nor permit landlords to demand of tenants more than the fair value of the property and services which are provided. [*Troy Hills Village v. Township Council of Parsippany-Troy Hills, supra*, 68 *N.J.* at 629.]

For the most part, New Jersey's rent control ordinances have been second-generation ordinances that allow a reasonable passthrough of operating expenses. Note, *Rethinking Rent Control: An Analysis of "Fair Return"*, 12 *Rutgers L.J.* 617, 624-25 (1981). They are designed to prevent overcharging or gouging. *Id.* They must be presumed to be directed at the maintenance of rental housing as a vital segment of a free market housing economy.

Cal.Rptr. at 713. The opposite seems necessarily true, that an ordinance cannot indefinitely reduce operating profit without eventually causing confiscatory results. This is the theme of *Helmsley*, discussed in terms of operating ratios, *Helmsley v. Borough of Fort Lee, supra*, 78 *N.J.* at 217-20, as well as in the context of diminishing net operating income, *id.* at 223 ("[a]t some point, steady erosion of [net operating income] becomes confiscatory") (footnote omitted). But ratios are all subject to divergence. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, supra*, 35 *Rutgers L.Rev.* at 805 (study of operating-cost-to-gross-rental-income ratios of Washington, D.C., apartments revealed average ratios ranging from .53 to .81); Baar & Keating, *Controlling Rent Control, supra*, 11 *N.J. Reporter* at 23 ("[i]n a community where buildings are assessed at 70 percent of value on the average, some buildings will be assessed at less than 50 percent, others at more than 90 percent of value"). Using reduction of net operating income will be a useful tool in applying this analysis.

Although there is a difference between operating ratio and maintenance of net operating income, the latter method is less susceptible of manipulation and easier for reviewing courts to employ. It necessarily presupposes that a landlord will maintain and submit to rent leveling boards levels of operating expenses. Of course there will be dispute about whether a chosen base-period rent is a fair rent.

[5] In the Weehawken case, the trial court believed that if an income-based standard had been used in the ordinance, plaintiffs would have been entitled to some relief. By allowing courts to evaluate fair return in this light, we believe that the purposes of rent control in New Jersey will be furthered. If it is thus shown that an ordinance is defeating the purpose of rent control by steadily diminishing income and causing the flight of

rental housing from the market, relief would be warranted.[11] However, because of the manner in which the Weehawken case was tried and has evolved, we do not find a remand to be in order.

V

We offer these suggestions not in the belief that they will resolve all the complexities of rent control litigation but in the belief that they will help trial courts and parties in addressing the issues involved. So much has happened since the reappearance of rent control in New Jersey that we believe progress can be made in this sensitive area of municipal

---

[11] As economic conditions change in New Jersey, perhaps some consideration may be given in an appropriate case to whether the rental income allowed under the ordinance is commensurate with a fair return on the assessed value of the property. We realize that in *Helmsley v. Borough of Fort Lee*, this Court rejected a value-based return. 78 *N.J.* 200, 215 (1978), *appeal dismissed*, 440 *U.S.* 978, 99 S.Ct. 1782, 60 *L.Ed.*2d 237 (1979). Nonetheless, there is a constitutional imperative that all real property be assesed "according to the same standard of value," *N.J. Const. of 1947* art. VIII, sec. 1, para. 1; that imperative has been effectauted by the legislative criterion of assessment at "true value," *N.J.S.A.* 54:4-2.25.

In the years since the development of rent control, it has frequently been necessary to evaluate property in New Jersey in light of or even despite rent control ordinances. Courts have striven to ascertain true value. In cases where there is potential for condominium conversion, assessments are beginning to reflect the values that encourage people to remain investors in real estate. *See, e.g., Americana Assocs. v. Borough of Fort Lee*, 202 *N.J.Super.* 92, 96 (App.Div.) *certif. denied*, 102 *N.J.* 304 (1985) ("fact that property may, as an abstract proposition, have potential conversion value may not be treated as an increment to value unless shown by quantifying evidence to be of meaningful substance").

We realize that there are complexities to this suggestion, not the least of which will be consideration of tax-passthrough features of the ordinance and the appropriate application of the Director's Ratio (L. 1973, c. 123, § 2, *repealed by L.* 1983, c. 45, § 54:51A-21 (current version at *N.J.S.A.* 54:51A-6)) to the assessed value, that may invite the same "circular process" disapproved by *Helmsley v. Borough of Fort Lee, supra*, 78 *N.J.* at 214. Still, that circularity might be avoided by a properly tailored and limited inquiry as to the relationship of the return to assessed value.

economic regulation. The rental shocks of the 1970s have been eased by the abatement of double-digit inflation, high interest rates, and oil embargoes; for how long we do not know. Tenants' and owners' interests may now be better able to coalesce in the maintenance of a viable rental housing market.

As noted, in the cases before us the records do not establish that the ordinances have had a confiscatory effect. The judgments the the Appellate Division are affirmed.

For affirmance—Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN and STEIN—6.

For reversal—None.

APPENDIX B

APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1072-83 T2

JOE MAYES, trading as Jackson Estates,
Plaintiff-Appellant,

v.

JACKSON TOWNSHIP RENT LEVELING BOARD and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF JACKSON,
Defendants-Respondents,

v.

JACKSON ESTATES MOBILE HOME-OWNERS ASSOCIATION,
Intervenor.

Argued September 24, 1984 - Decided Oct. 16, 1984

Before Judges McElroy, Dreier and Shebell.

On appeal from the Superior Court, Law Division, Ocean County.

Micheal E. Levin argued the cause for appellant (Matthews, Levin, Shea & Pfeffer, attorneys: Mr. Levin, on the brief).

Joseph F. Martone argued the cause for respondents (Stanzione, Stanzione, Martone & Rosen, P.A., attorneys; Mr. Martone, on the brief).

Connie M. Pascale argued the cause for intervenor.

PER CURIAM

Appellant, owner of a mobile home park, made application to defendant, Jackson Township Rent Leveling Board, for rental increases under sections 86-4 (consumer price index) and/or section 86-5 (return on investment) of the Jackson Township rent leveling ordinance, specifying the rental increase sought was based on his right to a fair rate of return notwithstanding an ordinance cap of 7½ per cent return on investment. Plaintiff applied to the Law Division when action was not promptly taken by the Rent Leveling Board. The court granted plaintiff a CPI rent increase effective February 1, 1982, instructed the Rent Leveling Board to begin hearings, and permitted plaintiff to make a record as to the fair rate of return despite the 7½ per cent ceiling.

The Board concluded that the plaintiff had "shown no basis for any additional rental increase." Plaintiff appealed the Board's decision to the defendant Jackson Township Committee. The court permitted Jackson Estates Mobile Homeowners Association to intervene. After the Township Committee affirmed the denial the matter came before the Law Division for review. The court upheld the Board's decision but held the principles which it applied in *United Mobile Homes, Inc. et al v. Township of Jackson*, Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-44125-81, permitted plaintiff to obtain a return on his investment in the mobile home park based on present day value of his actual cash investment. The court ruled that the 7½ per cent cap on rate of return was neither facially invalid nor invalid as applied to plaintiff.

Plaintiff appeals the denial of relief and maintains that the 7½ per cent cap is confiscatory as the evidence established that a rate of return of 16 per cent was the minimum fair return for an investment in a mobile home park and that if the 7½ per cent cap is allowed to stand it will encourage the flight of capital from the rental housing market. Plaintiff raises multiple objections to the methods used to calculate fair rental.

We affirm substantially for the reasons given in the August 17, 1983 oral opinion of Judge James M. Havey.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

APPENDIX C

ORDER FOR JUDGMENT DATED SEPTEMBER 27, 1983

JOSEPH F. MARTONE, ESQ.
200 Main Street, P.O. Box 417
Toms River, New Jersey 08753
(201) 240-1234 JFM: amc
Attorney for Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, OCEAN COUNTY
Docket No. L 25741-81 E.P.W.
Civil Action
ORDER FOR JUDGMENT

JOE J. MAYES, t/a JACKSON ESTATES,
Plaintiff,

v.

JACKSON TOWNSHIP RENT LEVELING BOARD, TOWNSHIP OF JACKSON, AND JACKSON TOWNSHIP COMMITTEE,
Defendants.

THIS MATTER having come on for trial, and the Court having read and considered the transcript of proceedings before the Jackson Township Rent Leveling Board, the documents and exhibits submitted to the Board, and having considered the trial briefs and legal arguments submitted by the attorneys for the respective parties; and the Court having determined that the principles applied by this Court in "United Mobile Homes, et al. v. Township of Jackson", Docket No. L 44125-81, apply to the record in this matter, and that even if plaintiff's investment in the mobile home park were increased to reflect the

present-day value of that investment, plaintiff would not be entitled to a rental increase under Section 86-5 of the ordinance exceeding that which plaintiff previously received under Section 86-4 of the ordinance; and the Court having further determined that nothing in the record indicates that ordinance as applied by defendant Rent Leveling Board to this application either resulted in confiscation or deprived plaintiff in any way of a fair and reasonable rate of return; and the Court having previously determined that the ordinance meets minimal constitutional requirements and the Court having further determined that Section 86-5, Subsection G of the ordinance is merely a limitation on the interest rate that may be charged by a stock holder to a mobile home corporation, and that its purpose is not to establish a rate of return on investment: and the Court being satisfied that the findings and conclusions of the Rent Leveling Board did not amount to an abuse of discretion, did not amount to confiscation, and did not deprive plaintiff of a reasonable rate of return;

IT IS on this 27th day of September, 1983,

ORDERED that judgment be entered in favor of defendants and against plaintiff, dismissing plaintiff's complaint in this matter, without costs.

s/J.M.H.

JAMES M. HAVEY, J.S.C.

APPENDIX D

SUPREME COURT OF NEW JERSEY

No. 23,355 Term 1984

JOE MAYES, trading as Jackson Estates,
Plaintiff-Appellant,
vs.
JACKSON TOWNSHIP RENT LEVELING BOARD, AND TOWNSHIP COMMITTEE OF THE TOWNSHIP OF JACKSON,
Defendants-Respondents,
vs.
JACKSON ESTATES MOBILE HOME-OWNERS ASSOCIATION,
Intervenors.

Civil Action: On Appeal from Judgment, Entered September 27, 1983, in the Superior Court of New Jersey, Law Division, Ocean County
Docket No. A-1072-83-T2
Sat Below: Havey, J.S.C.

SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLANT

LEVIN, SHEA & PFEFFER
Attorneys for Plaintiff-Appellant
P.O. Box 1050
255 West County Line Road
Jackson, New Jersey 08527

MARGARET McMAHON
On the Brief

Honorable Justices of the Supreme Court of New Jersey:

Please accept this Supplemental Letter Brief filed on behalf of plaintiff-appellant pursuant to R. 2:6-2 (b).

TABLE OF CONTENTS

PROCEDURAL HISTORY OF PLAINTIFF-APPELLANT

Plaintiff-Appellant shall rely in part upon the procedural history set forth in the brief filed with the Superior Court of New Jersey, Appellate Division, on behalf of plaintiff-appellant.

On October 16, 1984, the Superior Court of New Jersey, Appellate Division, affirmed the lower Court finding in favor of the defendants-respondents and against the plaintiff-appellant.

The plaintiff-appellant filed a petition for certification to the Superior Court, Appellate Division, on November 13, 1984. On September 17, 1985, plaintiff-appellant's petition for certification was granted by the Supreme Court of New Jersey.

STATEMENT OF FACTS OF PLAINTIFF-APPELLANT

Plaintiff-Appellant shall rely in full upon statement of facts set forth in the brief filed with the Superior Court of New Jersey, Appellate Division, on behalf of plaintiff-appellant.

POINT I

THE INCORPORATION OF A 7½% CAP ON THE LANDLORD'S RETURN ON INVESTMENT CONSTITUTES A TAKING OR, ALTERNATIVELY, A CONFISCATION OF PLAINTIFF'S PROPERTY IN DEROGATION OF THE NEW JERSEY CONSTITUTION AND THE UNITED STATES CONSTITUTION.

The Fifth Amendment of the United States Constitution states... "nor shall private property be taken for public use without just compensation." *U.S. Const. Amend. 5.* The Fifth Amendment is enforced upon the States through the provision of the Fourteenth Amendment. *U.S. Const. Amend. 14.* Pursuant to the New Jersey Consitution, "(p)rivate property shall not be taken for public use without just compensation." *N.J. Const., Art. 1, par. 1.*

A landlord's fair rate of return on the value of his investment constitutes property within the meaning of the constitutional provisions cited above. "A calling, business or profession, chosen and followed, is property. The legislature can no more destroy a business by statute, without providing

for compensation, than it can authorize a corporation to take a piece of real estate for public use, except upon compensation." *State v. Chapman*, 69 N.J.L. 464, 466 (1903).

The applicable Jackson Township Rent Control Ordinance [1] (Pa397a through Pa413a), with a 7½% cap of the maximum fair rate of return allowed, represents a taking of plaintiff's private property exercised by the municipality under its police power. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922).

The proper test for ascertaining whether excessive governmental regulations constitute a taking is "does the regulation go too far; is it excessive?". *Sheerr v. Evesham Township*, 184 N.J. Super 11, 53 (Law Div. 1982). The inclusion of a 7½% cap on a landlord's return is not necessary to effectively regulate rent levels in Jackson Township. The New Jersey decisions of *Helmsley v. Fort Lee*, 78 N.J. 200 (1978), *Hutton Park Gardens v. West Orange*, 68 N.J. 453 (1975), and *Troy Hills v. Parsippany-Troy Hills*, 68 N.J. 604 (1975), mandate a just and reasonable return on a landlord's investment. Jackson Township's attempt to mandate a return limited by a 7½% cap is an excessive and unnecessary regulation.

---

[1] References are found in plaintiff-appellant's Appellate brief and appendix filed with petition for certification.

"(I)n order for a rent control ordinance to survive a constitutional challenge, it must be non-confiscatory as applied, as well as non-confiscatory on its face." *Orange Taxpayers Council, Inc. v. City of Orange,* 169 N.J. Super 288, 296 (App. Div. 1979). The just and reasonable return on plaintiff's investment as calculated by the plaintiff-appellant's expert witness exceeds the 7½% ceiling incorporated into the ordinance. This indicates that although the ordinance may not be confiscatory on its face as applied in all cases, it is confiscatory as applied to this case.

The Jackson Township Ordianance does not permit an efficient landlord to realize a just and reasonable return on his property. Because of the 7½% ceiling, plaintiff is in essence being called upon to subsidize his tenants. The result is either a "taking" compensable under New Jersey case law or, alternatively, unconstitutional as confiscatory. As stated in *Property Owners Association of North Bergen v. The Township of Bergen,* 74 N.J. 327 (1977) at 366, "(u)nder the terms of this ordinance, the landlord may not recoup any additional funds to which he is rightfully entitled. Imposition of that burden would deprive an owner of property without due compensation. Such rent control is confiscatory and unconstitutional."

The 7½% ceiling on plaintiff's return is below what plaintiff-appellant's expert recognizes as a reasonable return as mandated by case law, and therefore, it would appear that, in fact, a taking has occurred or, alternatively, an unconstitutional confiscation of plaintiff's property.

POINT II

THE COURT BELOW SHOULD HAVE ALLOWED THE USE OF ALTERNATIVE INVESTMENTS AS AN AVAILABLE MEANS OF ARRIVING AT A FAIR RATE OF RETURN.

In the case now before the Court, plaintiff-landlord demonstrated that use of alternative investments as a basis for determining a fair rate of return results in a rate of return far in excess of the 7½% ceiling contained within §86-5(A) of the Jackson Township Rent Leveling Ordinance [2](Pa401a through Pa402a).

In *Glen Wall Associates v. Wall Township*, 99 N.J. 265 (1985) at 279-280, the Court states, "...what is required is that reliable market data be furnished to the Court as the basis for the expert's opinion so that the Court may evaluate the opinion." It is undisputed that plaintiff's expert fully documented his opinion, thereby providing sufficient evidence to provide the Court with a basis for applying its own knowledge to determine a fair rate of return. *Glen Wall Associates*, supra, 99 N.J. at 280.

---

2 References are found in plaintiff-appellant's Appellate brief and appendix filed with petition for certification.

Although the *Glen Wall Associates* decision deals with review of a property tax investment, use of alternative investments is readily applicable to the Jackson Estates application for rental increase under portions of the Jackson Township Rent Leveling Ordinance [3](Pa397a through Pa413a).

CONCLUSION

For all the reasons contained within this Supplemental Letter Brief, plaintiff-appellant respectfully argues that the incorporation of a 7½% cap on the plaintiff-appellant's return on investment constitutes a taking or, alternatively, a confiscation of plaintiff-appellant's property in derogation of the New Jersey Constitution and the United States Constitution.

In addition to the above, plaintiff-appellant further argues that use of alternative investments as an available means of determining a fair rate of return is proper in the case now before this Court.

Respectfully submitted,

LEVIN, SHEA & PFEFFER
Attorneys for Plaintiff-Appellant

By: s/M.M.
MARGARET McMAHON

DATED: OCTOBER 10, 1985

---

3 References are found in plaintiff-appellant's Appellate brief and appendix filed with petition for certification.

SUPREME COURT OF NEW JERSEY

No. 23,355 TERM 1984

JOE MAYES, trading as JACKSON ESTATES,
Plaintiff-Appellant,

vs.

JACKSON TOWNSHIP RENT LEVELING BOARD, TOWNSHIP OF JACKSON, AND JACKSON TOWNSHIP COMMITTEE,
Defendants-Respondents.

Civil Action: PETITION FOR CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION
Sat Below: McElroy, J.S.C., Dreier, J.S.C., Shebell, J.S.C.

MATTHEWS, LEVIN, SHEA & PFEFFER, ESQS.
255 West County Line Road
Jackson, New Jersey 08527
(201) 364-7333
Attorney for Plaintiff-Appellant

TABLE OF CONTENTS PAGE

TABLE OF CITATIONS

PAGES

STATUTORY PROVISIONS

PETITION FOR CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of New Jersey:

Plaintiff-Appellant, Joe Mayes, trading as Jackson Estates, of Jackson, New Jersey, respectfully shows:

STATEMENT OF MATTERS INVOLVED

1. Judicial review is sought for a municipal rent control measure to determine whether the maximum return permitted by the Ordinance results in an unconstitutional confiscation of plaintiff's property. The Jackson Township Rent Leveling Ordinance sought to be reviewed provides for a 7½% maximum rate of return on the owner's historical investment adjusted for inflation. The municipality introduced no evidence to sustain its 7½% rate ennumerated by the Ordinance questioned herein. The plaintiff was allowed to develop a full record in spite of the 7½% cap. The plaintiff's proof showed that a 16% rate of return was the lowest constitutional non-confiscatory rate. The Court subsequently ruled that, although the non-confiscatory rate was shown to be 16% by expert testimony, the Rent Leveling Board could not disregard the 7½% cap imposed by the Ordinance.

2. A rate of return provision contained within a Rent Control Ordinance, with a cap upon the rate, which is applicable to all property at all times, will inevitably result in efficient landlords not receiving a just and reasonable return in individual cases.

The Court below held that to establish the value of property appropriately the value must be upgraded for inflation and connot be frozen. Yet, with this admission, the Court also held that the Rent Leveling Board could not disregard the 7½% cap. The Court below, in effect, said that the value of property must be upgraded for inflation but said that an arbitrary cap can remain the same over time.

The appropriate test to be applied in a confiscation case is a 2 step one: A) the rate base or value, must be established at the time of the application; and B) the fair rate of return must also be established (i.e. the lowest constitutionally permissible rate) at the same point in time. The Court only allowed the first portion of this test with regard to the value for rate base at the time of application and then went on to refuse all proofs with regard to a fair rate of return which established a rate far above the 7½% local ordinance cap.

3. This case invloves an appeal taken to the Supreme Court pursuant to Rule 2:2-1 because it resulted in a final decision of the Appellate Division covering a substantial question arising under the Constitution of this State, and the United States Constitution, i.e., the confiscation of plaintiff's property. N.J. Const. Art. I, par. 1; U.S. Const. Amend. 14.

The instant case presents questions of general public importance because it will adversely affect the investment climate for rental housing in this State. It is highly unlikely that owners will construct affordable rental housing in an environment which restricts the rate of return substantially below the rate of return available through other investments. This Court has recognized a Constitutional need in this State for affordable housing. The confiscation caused by the 7½% cap with its attendant disincentive to invest in rental housing, along with the need for affordable housing previously stated reflects the inherent conflict presented by this case. Therefore, this case presents a question of general public importance and it is respectfully submitted that certification is appropriate.

Grounds for certification are also found in the inherent conflict between the Court's determination that the plaintiff be allowed to make a full record as to the appropriate rate of return and the converse Court ruling that the Rent Leveling Board could not disregard the Ordinance as 7½% cap. The final judgment of the Appellate Division was entered on October 16, 1984, Notice of Petition for Certification was filed November 2, 1984. The Appellate Division affirmed the lower Court's opinion. Copies of these opinions are annexed to this Petition.

ARGUMENT

POINT I

THE INHERENT RIGHT TO A FAIR RATE OF RETURN COUPLED WITH THE 7½% CAP ON THE RATE OF RETURN WHICH THE RENT LEVELING BOARD WAS BOUND BY, CAUSED A CONFISCATION OF PLAINTIFF'S PROPERTY IN DEROGATION OF THIS STATE'S CONSTITUTION AND THE UNITED STATES CONSTITUTION.

The fundemental initial issue in a confiscation case is whether an individual owner has a right to a reasonable rate of return on the value of his investment. Every Rent Control Ordinance has inherent within it a landlord's right to receive a fair rate of return. *Hutton Park Gardens vs. West Orange Town Council,* 68 N.J. 543, at 574 (1975). The Township Ordinance questioned herein does not contain a mechanism for the property owner to show what a fair rate of return would be because it includes a cap on the maximum amount allowed.

The polarity between the Ordinance and the ruling in *Hutton Park, supra,* is best exemplified by the Court orders issued in January and April, 1982. On January 29, 1982 the Trial Court ordered that the defendant, Rent Leveling Board, was to hold hearings immediately on the applicants application and the Board was to allow the applicant to present evidence to establish a fair rate of return notwithstanding the 7½% cap contained in the local ordiance. In apparent contradiction, the Court ordered on April 7, 1982 that the Rent Leveling Board could not disregard the 7½% ceiling on the rate of return even though the plaintiff-appellant had established a record before the defendant exceeding that level.

The quandary has left the plaintiff herein with a cognizable cause of action and no apparent recourse. The Rent Leveling Board as allowed to hear that the plaintiff was entitled, as a matter of a constitutional right, to a fair rate of return of 16%, and then instructed to disregard the plaintiff's proofs and act within the letter of the Ordinance.

POINT II

THE LOWER COURT ERRED BY NOT STRIKING DOWN THE 7½% CAP WHEN THE PLAINTIFF WAS ABLE TO SHOW THAT A FAIR RATE OF RETRUN EXCEEDED THIS CAP.

A Rent Control Ordinance is deemed to intend and to permit a landlord to apply to the local Rent Leveling Board for relief on the ground that the regulation has inherent in it the right to a just and reasonable rate of return. *Hutton Park, supra,* at 574. In the event that a conflict exists between the limitation on the rental increase imposed by a local Rent Leveling Ordinance and the right to a fair rate of return to the applicant, the inherent right to a fair rate of return must prevail, as stated below:

> If a conflict exists between limitations on rental increase provided in a fair return relief mechanism and the constitutional requirement of a fair rate of return, the later is supreme. To put it another way, if the maximum increase permitted by a Rent Control Ordinance is insufficient to provide an efficient operator with a just and reasonable rate of return, the return requirement is supreme and the ceiling provision becomes inoperative. See *Helmsley v. Boro of Fort Lee*, 78 N.J. 200, at 210 (1978). *Hutton Park Gardens*, supra at 568., *Park Tower Apartments, Inc. v. Bayonne*, 185 N.J. Super, 211, at 221 (Law Div. 1982).

The mandate is apparent. When an Ordinance imposes a cap, and the fair rate of return as shown by proofs exceeds the level of the cap, the fair rate of return must be utilized.

POINT III

THE LOWER COURT ERRED IN IT'S DETERMINATION BECAUSE IT NEVER CONSIDERED THE TWO SEPARATE TESTS AS ENNUMERATED IN TROY HILLS VILLAGE V. TOWNSHIP COUNCIL OF TOWNSHIP OF PARSIPPANY-TROY HILLS, 68 N.J. 606, (1975).

The procedure that the defendant, Rent Leveling Board, should have followed and the procedure that should have been applied by the Court below was described by Justice Pashman:

> We perceive that deciding whether a Rent Regulation permits a just and reasonable return requires consideration of the value of the rental property, the reasonable expense of operating the property, the income, the rate of return of the value of the property actually permitted by the Rent Regulation and the minimum rate of return which would be just and reasonable for that property. *Basically, this procedure involves two separate stages of calculations.* First, the tribunal must make a factual finding as to the rate of return on the value of the property which the landlord will, in fact, receive under the governing Rent Leveling Ordinance. Second, the tribunal must make a factual determination as to that rate of return below which an actual rate of return would be confiscatory. This second determination can be designated as the just and reasonbale rate of return on the value of a given rental unit. If the rate of return which the landlord actually receives falls below the just and reasonable rate, then the Ordinance must be invalidated as confiscatory. *Troy Hills Village vs.*

Township Council of the Township of Parsippany-Troy Hills, 68 N.J. 604 at 621-2 (1975). (Emphasis added).

The second part of the test ennumerated in *Troy Hills, supra,* is to determine what the just and reasonable rate of return would be. Plaintiff presented numerous proofs as to a just and reasonable rate of return at the time of application by expert testimony and by reference to Section 86-5(G) of the Rent Control Ordinance. Section 86-5(G) mandates a rate of return on an "insider loan" made to a park to be calculated at an interest rate equal to the current savings rate on a 30 month savings institution certificate and that rate at the time of application was in excess of 16%. Plaintiff argues that if the fair rate of return for "insider" loans is rate sensitive then so to should be the rate of return on the investment as a whole.

POINT IV

CERTIFICATION SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS IMPORTANT QUESTIONS AS TO ADVERSE IMPACT ON INVESTMENT IN RENTAL HOUSING AND A PROPERTY OWNERS INHERENT RIGHT TO A JUST AND REASONABLE RATE OF RETURN.

This case involves an important question of law which will have a direct impact upon the willingness of investors and builders to provide affordable rental housing to residents of this state. There are many reasons why there is a shortage of affordable housing in the State of New Jersey. The plaintiff herein believes that if the cap questioned herein is allowed to stand another reason will have been created adding to the shortage

of affordable housing. Allowing municipalities to restrict the rate of return to investors in rental housing to 7½% will become a permanent obstacle to investment. The plaintiff is hard pressed to conceive that any investor/builder will invest in a municipality in New Jersey if that municipality adopts a Rent Control Regulation, or currently has on its books a regulation, which caps the investors return to 7½% or to any other fixed rate. Thus, it is clear that, if this decision is upheld, its ultimate adverse impact will be upon all the residents of New Jersey. See *Southern Burlington County N.A.A.C.P. vs. Township of Mount Laurel*, 92 N.J. 158 (1983).

This case as previously discussed in Point I involves substantial and important matters of Constitutional law. The just and reasonable rate of return through plaintiff's proof has been shown to be 16% so that the 7½% cap imposed by Ordinance is substantially below this and as such, constitutes a constitutional confiscation. See *Hutton Park, supra*, N.J. Const. Art. I., par. 1, U.S. Const. Amend. 14. The efficient landlord is entitled to receive a just and reasonable return on his investment and a Rent Control Ordinance is deemed to contain such a provision. See *Hutton Park, supra*, at 574.

CONCLUSION

WHEREFORE, the plaintiff prays for the reasons set forth herein, that this Court grant certification.

Respectfully submitted,

Matthews, Levin, Shea & Pfeffer, Esqs.

By: s/M.E.L.

MICHAEL E. LEVIN, ESQ.

Dated: November 9, 1984

CERTIFICATION

I hereby certify that the foregoing Petition presents a substantial question meriting certification, and that it is filed in good faith and not for purposes of delay.

s/M.E.L.

MICHAEL E. LEVIN, ESQ.

Dated: November 9, 1984

ORDER FOR JUDGMENT DATED SEPTEMBER 27, 1983

JOSEPH F. MARTONE, ESQ.
200 Main Street, P.O. Box 417
Toms River, New Jersey 08753
(201) 240-1234 JFM: amc
Attorney for Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, OCEAN COUNTY
Docket No. L 25741-81 E.P.W.
Civil Action: ORDER FOR JUDGMENT

JOE J. MAYES, t/a JACKSON ESTATES,
Plaintiff,

v.

JACKSON TOWNSHIP RENT LEVELING BOARD, TOWNSHIP OF JACKSON, AND JACKSON TOWNSHIP COMMITTEE
Defendants.

THIS MATTER having come on for trial, and the Court having read and considered the transcript of proceedings before the Jackson Township Rent Leveling Board, the documents and exhibits submitted to the Board, and having considered the trial briefs and legal arguments submitted by the attorneys for the respective parties; and the Court having determined that the principles applied by this Court in "United Mobile Homes, et al v. Township of Jackson", Docket No. L 44125-81, apply to the record in this matter, and that even if plaintiff's investment in the mobile home park were increased to reflect the present-day value of that investment, plaintiff would not be

entitled to a rental increase under Section 86-5 of the ordinance exceeding that which plaintiff previously received under Section 86-4 of the ordinance; and the Court having further determined that nothing in the record indicates that ordinance as applied by defendant Rent Leveling Board to this application either resulted in confiscation or deprived plaintiff in any way of a fair and reasonable rate of return; and the Court having previously determined that the ordinance meets minimal constitutional requirements; and the Court having further determined that Section 86-5, Subsection G of the ordinance is merely a limitation on the interest rate that may be charged by a stock holder to a mobile home corporation, and that its purpose is not to establish a rate of return on investment; and the Court being satisfied that the findings and conclusions of the Rent Leveling Board did not amount to an abuse of discretion, did not amount to confiscation, and did not deprive plaintiff of a reasonable rate of return;

IT IS on this 27th day of September, 1983,

ORDERED that judgment be entered in favor of defendants and against plaintiff, dismissing plaintiff's complaint in this matter, without costs.

s/J.M.H.

JAMES M. HAVEY

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1072-83 T2

JOE MAYES, trading as
Jackson Estates,
Plaintiff-Appellant

v.

JACKSON TOWNSHIP RENT LEVELING BOARD and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF JACKSON,
Defendants-Respondents,

v.

JACKSON ESTATES MOBILE HOME-OWNERS ASSOCIATION,
Intervenor.

Argued September 24, 1984 - Decided October 16, 1984

Before Judges McElroy, Dreier and Shebell.

On appeal from the Superior Court, Law Division, Ocean County.

Michael E. Levin argued the cause for appellant (Matthews, Levin, Shea & Pfeffer, attorneys; Mr. Levin, on the brief).

Joseph F. Martone argued the cause for respondents (Stanzione, Stanzione, Martone & Rosen, P.A., attorneys; Mr. Martone, on the brief).

Connie M. Pascale argued the cause for intervenor.

PER CURIAM

Appellant, owner of a mobile home park, made application to defendant, Jackson Township Rent Leveling Board, for rental increases under sections 86-4 (consumer price index) and/or section 86-5 (return on investment) of the Jackson Township rent leveling ordinance, specifying the rental increase sought was based on his right to a fair rate of return notwithstanding an ordinance cap of 7½ per cent return on investment. Plaintiff applied to the Law Division when action was not promptly taken by the Rent Leveling Board. The court granted plaintiff a CPI rent increase effective February 1, 1982, instructed the Rent Leveling Board to begin hearings, and permitted plaintiff to make a record as to the fair rate of return despite the 7½ per cent ceiling.

The Board concluded that the plaintiff had "shown no basis for any additional rental increase." Plaintiff appealed the Board's decision to the defendant Jackson Township Committee. The court permitted Jackson Estates Mobile Homeowners Association to intervene. After the Township Committee affirmed the denial the matter came before the Law Division for review. The court upheld the Board's decision but held the principles which it applied in *United Mobile Homes, Inc. et al v. Township of Jackson*, Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-44125-81, permitted plaintiff to obtain a return on his investment in the mobile home park based on present day value of his actual cash investment. The Court ruled that the 7½ per cent cap on rate of return was neither facially invalid nor invalid as applied to plaintiff.

Plaintiff appeals the denial of relief and maintains that the 7½ per cent cap is confiscatory as the evidence established that a rate of return of 16 per cent was the minimum fair return for an investment in a mobile home park and that if the 7½ per cent cap is allowed to stand it will encourage the flight of capital from the rental housing market. Plaintiff raises multiple objections to the methods used to calculate fair rental.

We affirm substantially for the reasons given in the August 17, 1983 oral opinion of Judge James M. Havey.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

§ 86-5. Rental increase for financial requirements.

A. It is expressly recognized that an efficient landlord is entitled to a just and reasonable rate of return from his property. To that end, a landlord is permitted to make application to the Rent Leveling Board for rental increases on the basis that rents allowed by this chapter prevent the landlord from receiving a just and reasonable rate of return. Such rental increases shall be allowed on the basis of the formula set forth in this provision, which formula shall be the exclusive formula for determining a just and reasonable rate of return. Upon application duly made pursuant to the requirements of this chapter, the Rent Leveling Board may grant a park owner a rental increase upon his showing that his reasonable and necessary operating expenses for his last full calendar year exceeded fifty-seven and the five-tenths percent (57.5%) of his gross annual income. If the Rent Control Board is satisfied that such a showing has been established, then the Board may grant a rental increase sufficient to restore reasonable and necessary operating expenses to fifty-seven and five-tenths percent (57.5%) of the gross annual income [Amended 2-27-84 by Ord. No. 1-84]

B. Application requirements. (Amended 2-27-84 by Ord. No. 1-84]

(1) In any application under this section, the owner shall, in addition to those requirements mandated by other sections of this chapter, specifically certify:

(a) That he is an efficient operator of the mobile home park.

(b) That the mobile park is in a safe and sanitary condition.

(c) That the owner is in full compliance with all state and local laws pertaining to tenants' rights.

(2) The owner shall make application to the Rent Control Board, together with all necessary certifications, and shall further certify that the owner is not receiving a just and reasonable rate of return pursuant to the formula set forth herein. The application shall include the amount of increase and percentage of increase requested, together with detailed statements of income and expenses for the current fiscal year and for the past two (2) fiscal years. If at any time during the course of consideration of an increase pursuant to the provisions of this section the Rent Control Board shall determine that a landlord is not in substantial compliance with any or all of the above requirements, the Board may delay further consideration of the application for an increase and may delay the effective date of the increase until such time as the landlord has corrected any such deficiency.

C. Prior to the hearing by the Board on an application under this section, the owner must post, in a conspicuous place in or about the mobile home park, a notice of said application setting forth the basis for said application and the date, time and location of the formal hearing. Said notice must be posted at least seven (7) days prior to the proposed date of the formal hearing.

D. In order to provide the Rent Leveling Board with sufficient time to review the required financial data and schedule a hearing, it is required that an applicant submit an application for a rental increase under this section at least ninety (90) days prior to the effective date of the proposed rental increase.

E. In determining the need for a rental increase under this section, penalties, fines, interest and depreciation shall not be considered as reasonable and necessary operating expenses and shall not be included as proper expenses. In addition, an owner shall be entitled only to those ordinary and necessary professional fee expenses which are actually incurred in the ordinary course of business. [Amended 2-27-84 by Ord. No. 1-84]

F. The most recent current rents being charged by a landlord on uncontrolled rental spaces are admissible in evidence against such owner at any hearings held in connection with applications for rental increases under this section, and such rents create a rebuttable presumption that the charging of the same rent on all rental spaces would provide the owner with sufficient funds to pay all reasonable and necessary operating and maintenance expenses and provide the permitted rate of return. [Amended 2-27-84 by Ord. No. 1-84]

G. In the event that the financial information submitted by the owner reveals a loan made by the owner (or by a shareholder if the owner is a corporation), to the mobile home park, the interest expense on any such loan shall be computed based on a rate which is the current prevailing savings rate being paid on thirty-month savings institution certificates.

H. No owner shall be permitted to receive an increase under this section until such time as the owner has owned and operated the mobile home park for a period of twelve (12) months or until the close of the fiscal year of the mobile home park, whichever occurs first.

I. Increases authorized under this section shall be based only on financial information of park operation for the twelve-month period which closed immediately prior to the date of application under this section. Losses carried over from prior years or unrealized income for prior years shall not be included in computing interest under this section, except for second year or subsequent year losses incurred as a result of rental agreements exceeding one (1) year. [Amended 4-4-83 by Ord. No. 14-83; 2-27-84 by Ord. No. 1-84]

J. Except for second year or subsequent year losses incurred as a result of rental agreements exceeding one (1) year, no rental increase may be obtained by an owner under any provision of this chapter to cover operating losses incurred in prior years resulting for the failure of the owner

to either apply for or obtain rental increases or surcharges under this chapter or resulting from the owner's charging of rents under § 86-18 which are insufficient to meet operational requirements and obtain a reasonable rate of return. The failure of the owner to either apply for or obtain such rental increases or surcharges within three (3) months of the close of the fiscal year in which the operating losses are incurred or in which the reasonable rate of return is not realized or the owner's charging of such insufficient rents under § 86-18 during the fiscal year shall be deemed a waiver of the owner's right to such additional rents or surcharges. [Amended 2-27-84 by Ord. No. 1-84]

APPENDIX F

SUPREME COURT OF NEW JERSEY

M-347/348 September Term 1986

23,355

JOE MAYES, etc.,

Plaintiff-Movant,

v.

JACKSON TOWNSHIP RENT LEVELING BOARD, et al.,

Defendants-Respondents.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a motion for reconsideration as within time (M-347) is granted; and it is further

ORDERED that the motion for reconsideration of this Court's opinion reported at 103 *N.J.* 362 (1986) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 21st day of November, 1986.

s/ S.T.

Steven Townsend
Clerk of the Supreme Court

I hereby certify that the foregoing is a true copy of the original on file in my office.

Stephen Townsend
Clerk of the Supreme Court of New Jersey